


***CR 2017/8 - Fringe benefits tax: employers who are clients of Westhill Pty Ltd as trustee for the ASP Trust trading as Airport Security Parking and who enter into a Corporate Bailment Agreement***

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## Class Ruling

# Fringe benefits tax: employers who are clients of Westhill Pty Ltd as trustee for the ASP Trust trading as Airport Security Parking and who enter into a Corporate Bailment Agreement

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### **📌 This publication provides you with the following level of protection:**

This publication (excluding appendixes) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

If you rely on this ruling, the Commissioner must apply the law to you in the way set out in the ruling (unless the Commissioner is satisfied that the ruling is incorrect and disadvantages you, in which case the law may be applied to you in a way that is more favourable for you – provided the Commissioner is not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

## What this Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the relevant provisions identified below apply to the defined class of entities, who take part in the scheme to which this Ruling relates.

### Relevant provisions

2. The relevant provisions dealt with in this ruling are:

- subsection 7(1) of the *Fringe Benefits Tax Assessment Act 1986* (FBTAA)
- subparagraph 7(1)(a)(ii) of the FBTAA
- subsection 7(2) of the FBTAA
- subsection 7(3) of the FBTAA, and
- subsection 136(1) of the FBTAA.

All legislative references are to the FBTAA unless otherwise indicated.

## Class of entities

3. The class of entities to which this Ruling applies is employers who provide the private use of a car that they own or lease to an employee, or an associate of an employee, and enter into a Corporate Bailment Agreement (CBA) with Westhill Pty Ltd as trustee for the ASP Trust trading as Airport Security Parking (ASP).

## Qualifications

4. The Commissioner makes this Ruling on the precise scheme identified in this Ruling.

5. The class of entities defined in this Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 8 to 17 of this Ruling.

6. If the scheme actually carried out is materially different from the scheme that is described in this Ruling, then:

- this Ruling has no binding effect on the Commissioner because the scheme entered into is not the scheme on which the Commissioner has ruled, and
- this Ruling may be withdrawn or modified.

## Date of effect

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7. This Ruling applies from 1 April 2016. However, this Ruling will not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of this Ruling (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

## Scheme

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8. The following description of the scheme is based on information provided by the applicant:

- Class Ruling application dated 19 July 2016
- copy of the CBA dated 24 October 2016, and
- further information provided on 23 August 2016, 7 October 2016, 18 October 2016, 20 October 2016, 15 November 2016 and 28 November 2016.

**Note:** certain information has been provided on a commercial-in-confidence basis and will not be disclosed or released under Freedom of Information legislation.

9. ASP operates commercial parking stations that are accessible to the general public when parking at the Perth Domestic Airport and Perth International Airport. The services include secured long term parking.

10. ASP will enter into a CBA with employers whereby ASP will take possession, but not ownership, of a car provided for the private use of an employee, or an associate of an employee, while it is parked in the ASP parking facility.

11. Under the terms of the agreement a person who has authority to act for the employer is able to make a booking, using the ASP website telephone or email, to park the car in the ASP parking facility for a nominated period.

12. When a booking is made the employer must specify the registration number of the car. The booking will only be valid for the car that has that registration number. The booking is confirmed when ASP emails or telephones, a booking confirmation to the employer or representative of the employer.

13. The bailment period commences when the employee or associate of the employee or nominated representative delivers the car to the parking facility and the keys are surrendered to ASP. ASP will provide a tax invoice/receipt to the employee or associate of the employee.

14. The bailment period ends when ASP delivers the car and its keys back to the employee or associate of the employee or nominated representative. To obtain the car the employee or associate of the employee or nominated representative must provide:

- the docket issued when the car was parked at the car park
- photo identification or drivers licence
- receipt issued by ASP, or
- any other evidence of ownership authority or ASP deems satisfactory.

15. During the bailment period

- ASP will have exclusive use and possession of the car
- ASP will not be subject to any instructions or directions by the employer or employee, except those requiring observance of the terms of the agreement
- the employee, or associate of the employee, is prohibited from using the car for any purpose, and
- the car will only be moved or driven to enable ASP to perform parking services.

16. None of the employers will be associates of ASP. ASP and the employer will not have any other agreements for the use of the car.

17. The ASP car parking facility is not located at or near the residence of an employee or an associate of the employee, of the employer, and the car parked is not of a type described in subsection 7(2A).

## Ruling

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18. During the bailment period subsection 7(3) is not satisfied because both the employee and the associate of the employee are not entitled to use the car for any purpose and do not have custody or control of the car.

19. During the bailment period, because subsections 7(2) and 7(3) of the FBTA are not satisfied, subparagraph 7(1)(a)(ii) of the FBTA is not satisfied and the car is not taken to be available for the private use of the employee or an associate of the employee.

20. During the bailment period, there is no availability of the car which constitutes a benefit under subsection 7(1). Consequently, there is no car benefit under subsection 136(1).

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**Commissioner of Taxation**

15 February 2017

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## Appendix 1 – Explanation

**ⓘ** *This Appendix is provided as information to help you understand how the Commissioner's view has been reached. It does not form part of the binding public ruling.*

21. Subsection 136(1) defines car benefit as meaning a benefit referred to in subsection 7(1). Section 7 sets out the following conditions:

**7(1) [Car applied to, available for employee's private use]**

Where:

- (a) at any time on a day, in respect of the employment of an employee, a car held by a person (in this subsection referred to as the **provider**):
  - (i) is applied to a private use by the employee or an associate of the employee; or
  - (ii) is taken to be available for the private use of the employee or an associate of the employee; and
- (b) either of the following conditions is satisfied:
  - (i) the provider is the employer, or an associate of the employer, of the employee;
  - (ii) the car is so applied or available, as the case may be, under an arrangement between:
    - (A) the provider or another person; and
    - (B) the employer, or an associate of the employer, of the employee;

that application or availability of the car shall be taken to constitute a benefit provided on that day by the provider to the employee or associate in respect of the employment of the employee.

**7(2) [Car garaged at employee's residence]**

Where, at a particular time, the following conditions are satisfied in relation to an employee of an employer:

- (a) a car is held by a person, being:
  - (i) the employer;
  - (ii) an associate of the employer; or
  - (iii) a person (other than the employer or an associate of the employer) with whom, or in respect of whom, the employer or an associate of the employer has an arrangement relating to the use or availability of the car;

- (b) the car is garaged or kept at or near a place of residence of the employee or of an associate of the employee;

the car shall be taken, for the purposes of this Act, to be available at that time for the private use of the employee or associate, as the case may be.

### **7(3) [Car not at employer's business premises]**

Where, at a particular time, the following conditions are satisfied in relation to an employee of an employer:

- (a) a car is held by a person, being:
  - (i) the employer;
  - (ii) an associate of the employer; or
  - (iii) a person (other than the employer or an associate of the employer) with whom, or in respect of whom, the employer or an associate of the employer has an arrangement relating to the use or availability of the car;
- (b) the car is not at business premises of:
  - (i) the employer;
  - (ii) an associate of the employer; or
  - (iii) person (other than the employer or an associate of the employer) with whom, or in respect of whom, the employer or an associate of the employer has an arrangement relating to the use or availability of the car;
- (c) any of the following conditions is satisfied:
  - (i) the employee is entitled to apply the car to a private use;
  - (ii) the employee is not performing the duties of his or her employment and has custody or control of the car;
  - (iii) an associate of the employee is entitled to use, or has custody or control of, the car;

the car shall be taken, for the purposes of this Act, to be available at that time for the private use of the employee or associate, as the case may be.

### **7(4) [Prohibition on private use not consistently enforced]**

For the purposes of subsection (3), where a prohibition on the application of a car, or on the application of a car for a private use, by a person is not consistently enforced, the person shall be deemed to be entitled to use the car, or to apply the car to a private use, notwithstanding the prohibition.

22. The cars, which are owned, leased or in the possession of the employer are held in accordance with subsection 162(1). They are provided to the employees or their associate in respect of the employment of the employees.

23. Under subsection 7(1) a car benefit will arise if the car is:

- applied to a private use by the employee or an associate of the employee, or
- is taken to be available for the private use of the employee or associate of the employee.

24. During the period in which the car is parked in the ASP car parking facility the car is not used. Therefore, it will not be applied to a private use by the employee or an associate of the employee under subparagraph 7(1)(a)(i), and a car benefit will only arise if the car is taken to be available for the private use of an employee or an associate of the employee under subparagraph 7(1)(a)(ii).

25. Subsections 7(2) and 7(3) set out the circumstances in which a car shall be taken to be available for the private use of an employee or associate of an employee.

#### **Subsection 7(2): car garaged at employee's residence**

26. Under subsection 7(2) unless the car is a marked car used by an ambulance service, a firefighting service or a police service (subsection 7(2A)), the car will be taken to be available for the private use of an employee or associate of the employee if it is garaged at or near the residence of an employee or associate of the employee.

27. The cars parked by the employees, or associates of the employees at the ASP car parking facility are understood to be not of the specific type described in paragraph 26 above.

#### **Subsection 7(3): car not at employer's business premises**

##### ***Paragraphs 7(3)(a) and 7(3)(b): car held and not at business premises***

28. The particular time to be considered under subsection 7(3) is the bailment period when the car is parked at the ASP parking facility under the CBA.

29. The car is owned, leased or in the possession of the employer. The car is held in accordance with subsection 162(1). Paragraph 7(3)(a) is satisfied.

30. Subparagraphs 7(3)(b)(i) and (ii) are satisfied as the car is parked at the ASP parking facility which is not the business premises of the employer or associate of the employer.



31. The car is parked at the ASP parking facility which is the business premises of ASP. The employer enters into an arrangement with ASP. Under this arrangement there is no use of the car other than what would normally be conducted by the operator of a commercial car park in storing and maintaining a car. All other forms of use are expressly prohibited. This arrangement deals with car parking rather than with use of the car. There is no arrangement between the employer and ASP which relates to the use of availability of the car under subparagraph 7(3)(b)(iii).

32. Subparagraph 7(3)(b)(iii) is satisfied. Therefore, paragraph 7(3)(b) is satisfied.

***Subparagraph 7(3)(c)(i): employee entitlement to apply the car to a private use***

33. The employee's entitlement to apply the car to a private purpose is expressly prohibited in the CBA. ASP ensures that the car is not used by the employee for any private purpose (or any other purpose) during the bailment period.

34. The CBA provides an express prohibition as required under subsection 7(4). Each time a car is surrendered under a CBA the prohibition is enforced under the terms of an agreement to which the employer is a party. Subparagraph 7(3)(c)(i) is therefore not satisfied.

***Subparagraph 7(3)(c)(ii): employee not performing duties of employment and custody or control of the car***

35. In order to satisfy subparagraph 7(3)(c)(ii) the employee must have custody or control of the car. The FBTAA does not define the meaning of the words custody or control. In applying the ordinary meaning of custody the *Macquarie Dictionary*, [Online], viewed 17 November 2016, defines it as:

1. Keeping; guardianship; care: *in the custody of her father*.
2. Law legal guardianship of a child: *the mother was given custody*.

36. The *Macquarie Dictionary*, [Online], viewed 17 November 2016, defines control as:

1. to exercise restraint or direction over; dominate; command.
2. to hold in check; curb...
4. the act or power of controlling; regulation; domination or command.
5. check or restraint.

37. In *Federal Commissioner of Taxation v. Australia & New Zealand Banking Group Ltd*, (1979) 53 ALJR 336; (1979) 23 ALR 480; (1979) 9 ATR 483; (1979) 79 ATC 4039; (1979) 143 CLR 499; (1979) 16 ALR 721; [1979] HCA 67 (the ANZ case), the Court examined the access provisions in section 264 of the *Income Tax Assessment Act 1936* when a depositor had an agreement with the bank to use a safe deposit box located on a bank's premises. Both the bank and the depositor held duplicate keys to the contents of the box.

38. In the ANZ case, it was found that the bank had physical custody, physical control and legal control over the contents of the safe deposit box. In relation to the depositors, they maintained control, but not physical control, over the contents of the box.
39. In the present scheme, the car and car keys are surrendered by an employee to ASP under the CBA. ASP is then required to enforce a prohibition on any use of the car, private or otherwise, by the employee.
40. ASP can only release the car and car keys to the employee or the nominated employer representative. Alternatively if it is the associate who delivers the car and car keys, ASP can only release the car and car keys to the associate or nominated representative.
41. In these circumstances, the physical custody and physical control of the car are removed from the employee when ASP takes possession of the car and car keys.
42. The ATO position in relation to a car kept in a commercial garage for safe storage while the employee is travelling is contained in Taxation Determination TD 94/16 *Fringe benefits tax: where an employee is provided with a car by the employer and the car is kept in safe storage (e.g. in a commercial garage) while the employee is travelling, under what circumstances is that car taken to be available for private use under section 7 of the Fringe Benefits Tax Assessment Act 1986?* Example 1 in TD 94/16 is as follows:
1. An employee who is provided with a car by her employer leaves the car in a commercial storage facility (e.g. an airport parking station) while on an interstate business trip. The employee cannot leave the car on the employer's premises because there are no car parking facilities available. The commercial storage facility is no in the vicinity of the employee's residence. The car will not be taken as being available for the employee's private use if the employer removes the control and custody of the car from the employee (e.g. takes the car keys) and enforces a prohibition on the private use of the car by the employee or any associate of the employee.
43. In example 1 in TD 94/16 the car is kept in a commercial car park and the custody and control of the car are removed from the employee by means of the car being put in storage and by the employer taking the car keys. This example shows that both custody and control can be removed by physical means for the purposes of subsection 7(3).
44. In the present matter, and during the bailment period, the physical custody and physical control of the car are removed from the employee. In terms of subparagraph 7(3)(c)(ii) the employee does not have custody or control over the car. Subparagraph 7(3)(c)(ii) is therefore not satisfied.

***Subparagraph 7(3)(c)(iii): associate of employee entitlement to use the car, or custody or control of the car***

45. Subparagraph 7(3)(c)(iii) has two conditions, either of which must be satisfied. The first condition requires that an associate be entitled to use the car (for any purpose). As is the case for the employee, the entitlement to use the car is removed from the associate. The first condition to subparagraph 7(3)(c)(iii) is not satisfied.

46. The second condition requires that the associate has custody or control of the car. As is the case for the employee, custody and control of the car are removed from the associate. The second condition to subparagraph 7(3)(c)(iii) is not satisfied. Subparagraph 7(3)(c)(iii) is therefore not satisfied.

47. As subparagraphs 7(3)(c)(i), (ii) and (iii) are not satisfied paragraph 7(3)(c) and consequently subsection 7(3) are not satisfied.

## **Conclusion**

48. During the bailment period a car benefit does not arise under subsection 7(1)(a)(i) because the car is not applied to a private use by an employee or associate of the employee.

49. However a car benefit arises under subsection 7(1)(a)(ii) where the car is taken to be available for the private use of an employee or associate the employee. Subsections 7(2) and 7(3) set out the circumstances in which a car shall be taken to be available for the private use of an employee or associate of the employee.

50. During the bailment period, the car is not garaged at or near the residence of an employee or associate of the employee therefore it is not taken to be available for the private use of an employee or associate of the employee under subsection 7(2).

51. During the bailment period, employees or associates of employees are not entitled to the use the car for any purpose and do not have custody or control of the car. Therefore, the car is not taken to be available for the private use of an employee or associate of the employee under subsection 7(3).

52. As Subsections 7(2) and 7(3) are not satisfied, subparagraph 7(1)(a)(ii) is not satisfied and the car is not taken to be available for the private use of the employee or an associate of the employee during the bailment period.

53. During the bailment period there is no availability of the car which constitutes a benefit under subsection 7(1). Consequently, there is no car benefit under subsection 136(1).

## **Appendix 2 – Detailed contents list**

54. The following is a detailed contents list for this Ruling:

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## References

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*Previous draft:*

Not previously issued as a draft

*Related Rulings/Determinations:*

TR 2006/10; TD 94/16

*Legislative references:*

- FBTAA 1986
- FBTAA 1986 7
- FBTAA 1986 7(1)
- FBTAA 1986 7(1)(a)(i)
- FBTAA 1986 7(1)(a)(ii)
- FBTAA 1986 7(2)
- FBTAA 1986 7(2A)
- FBTAA 1986 7(3)
- FBTAA 1986 7(3)(a)
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- FBTAA 1986 7(3)(c)(ii)
- FBTAA 1986 7(3)(c)(iii)
- FBTAA 1986 7(4)
- FBTAA 1986 136(1)
- FBTAA 1986 162(1)
- ITAA 1936
- ITAA 1936 264
- TAA 1953

*Case references:*

- *Federal Commissioner of Taxation v. Australia & New Zealand Banking Group Ltd* (1979) 53 ALJR 336; (1979) 23 ALR 480; (1979) 9 ATR 483; (1979) 79 ATC 4039; (1979) 143 CLR 499; (1979) 16 ALR 721; [1979] HCA 67

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